LIBRARY
SUPREME COURT, U. S.

No. 75-1169

Supreme Court, U. S.
FILED
MAR 16 1976
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

JAMES C. GABRIEL,

*Petitioner,*

v.

BETTY LEVIN, *et al.*,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## RESPONDENTS' MEMORANDUM IN OPPOSITION

CRAVATH, ELSER & POLETTER
*Of Counsel*

SHELDON H. ELSER
*Counsel for Respondent*
*Betty Levin*
One Rockefeller Plaza
New York, N. Y. 10020
(212) JU 6-2211

DONOVAN LEISURE NEWTON & LUMBER
*Of Counsel*

M. LADUE WALKER
*Counsel for Respondent*
*Alleghany Corporation*
30 Rockefeller Plaza
New York, N. Y. 10020
(212) 489-4100

PORTHAUER LEVY HAUSMAN & BLOOM
*Of Counsel*

WILLIAM H. HAUSMAN
*Counsel for Respondent*
*Robert LeVeness*
[illegible] Madison Avenue
New York, N. Y. 10017
(212) [illegible]-4900

(Additional appearances of counsel are listed on next page)

DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD
*Of Counsel*

EVERETT I. WILLIS
*Counsel for Respondent Mississippi River Corporation*
140 Broadway
New York, N. Y. 10005
(212) DI 4-8000

SULLIVAN & CROMWELL
*Of Counsel*

DAVID W. PECK
*Counsel for Respondents Missouri Pacific Railroad Company, Robert H. Craft and T. C. Davis*
48 Wall Street
New York, N. Y. 10005
(212) 952-8100

IN THE

# Supreme Court of the United States

**October Term, 1975**

No. 75-1169

---

JAMES C. GABRIEL,

*Petitioner,*

v.

BETTY LEVIN, *et al.*,

*Respondents.*

---

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

---

## RESPONDENTS' MEMORANDUM IN OPPOSITION

This memorandum is submitted by all respondents (plaintiffs and defendants below) in opposition to the petition for a writ of certiorari filed by James C. Gabriel.

### The Decisions Below

This stockholders' representative and derivative action was brought by Class B stockholders of Missouri Pacific Railroad Company ("MoPac") mainly to compel the payment of greater dividends on the B stock. The United States District Court for the Southern District of New York, Weinfeld, J., approved the settlement of the action by

judgment of May 2, 1973; the Second Circuit affirmed on Judge Weinfeld's opinion; and this Court denied certiorari and rehearing. *Levin* v. *Mississippi River Corp.*, 59 F.R.D. 353 (S.D.N.Y.), *aff'd on opinion below sub nom. Wesson* v. *Mississippi River Corp.*, 486 F.2d 1398 (2d Cir.), *cert. denied sub nom. Wesson* v. *Levin*, 414 U.S. 1112 (1973), *rehearing denied*, 415 U.S. 939 (1974).

The settlement was also approved by the Interstate Commerce Commission after a full hearing in September of 1973 in which petitioner participated. *Missouri Pacific Railroad Co. Securities*, F.D. 27346, 347 ICC 377 (Div. 3, 1973). Petitions for reconsideration by the ICC were denied. The ICC decision was challenged before a three-judge court and upheld. *Gillespie* v. *U.S.* (Civ. Action No. 74-239C(2), November 14, 1974) (D.N.J.). The settlement was also approved by overwhelming majorities of both classes of MoPac's stock. It was fully consummated by January 1974.

One Michael Moumousis moved to set aside the judgment in the District Court, apparently under Rule 60(b), on November 26, 1973. That motion was denied by Judge Weinfeld on December 5, 1973. The Second Circuit affirmed the denial without opinion on December 18, 1974.

Napoleon C. Gabriel, the brother of the instant petitioner, moved to modify the judgment on March 26, 1974. That motion was similarly rejected by Judge Weinfeld on April 8, 1974 and was affirmed by the Second Circuit on December 18, 1974.

Plaintiffs' attorneys and the plaintiff Alleghany Corporation submitted an application for the allowance of attorneys' fees and costs in the District Court. After a full hearing on March 26, 1974, at which the instant peti-

tioner appeared, Judge Weinfeld rendered an opinion awarding attorneys' fees, 377 F. Supp. 926 (S.D.N.Y. 1974), and an appropriate order was entered on July 3, 1974. That order was appealed by Messrs. Moumousis, Napoleon Gabriel and other stockholders; the Second Circuit affirmed Judge Weinfeld's decision on December 18, 1974.

Messrs. Gabriel and Moumousis jointly petitioned this Court for a writ of certiorari from the denial of all of these motions; that petition was denied on April 14, 1975. *Gabriel* v. *Levin*, 421 U.S. 915 (1975). A petition for rehearing was denied on June 2, 1975. 421 U.S. 1006 (1975). A second petition for rehearing, served June 26, 1975, was refused by the Clerk of this Court for filing.

On their appeals from the judgment awarding attorneys' fees, costs were assessed against petitioners Moumousis and Gabriel. They then moved to reduce the costs by motion dated April 1, 1975. That motion was denied by the Second Circuit on or about April 22, 1975. Petitioners next moved for reconsideration of their motion to reduce costs on May 2, 1975. That too was denied on or about May 15, 1975. Petitioners moved for reconsideration *en banc* on June 2, 1975; that motion was denied on July 11, 1975.

On March 19, 1975, the instant petitioner moved to set aside the judgment in the District Court. That motion was denied on March 21, 1975. On April 11, 1975, petitioner filed a notice of appeal and his appeal was denied on November 18, 1975. Three successive motions for rehearing and related relief were denied by the Second Circuit on December 16, 1975, January 7, 1976, and February 2, 1976, respectively. The present petition seeks review of those orders.

## Reasons for Denying the Petition

Petitioner has once again challenged the efficacy of the settlement of this action. As the long and detailed post-settlement history of this litigation set forth above demonstrates, petitioner has had more than ample opportunity to challenge this judgment. His claims have been repeatedly proffered and repeatedly rejected by this Court, the Court of Appeals for the Second Circuit, the District Court, and the ICC. Petitioner should not be permitted to further abuse the judicial process by wasteful, time-consuming, costly and frivolous motions, appeals, and petitions.

Petitioner raises, among a multitude of alleged wrongs, no ground for reopening the judgment which was not raised at the original settlement hearing. He advances no argument or evidence which was not or could not have been considered at the settlement hearing. He makes no argument and proffers no evidence which has not been raised in the numerous motions and appeals detailed above. The District Court was clearly within its discretion in refusing to reopen a judgment under these circumstances.

## CONCLUSION

**The petition for a writ of certiorari should be denied.**

March 15, 1976

Respectfully submitted,


ORANS, ELSEN & POLSTEIN
*Of Counsel*

SHELDON H. ELSEN
*Counsel for Respondent Betty Levin*
One Rockefeller Plaza
New York, N. Y. 10020
(212) JU 6-2211

DONOVAN LEISURE NEWTON & IRVINE
*Of Counsel*

M. LAUCK WALTON
*Counsel for Respondent Alleghany Corporation*
30 Rockefeller Plaza
New York, N. Y. 10020
(212) 489-4100

POMERANTZ LEVY HAUDEK & BLOCK
*Of Counsel*

WILLIAM E. HAUDEK
*Counsel for Respondent Robert LeVasseur*
295 Madison Avenue
New York, N. Y. 10017
(212) 532-4800

DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD
*Of Counsel*

EVERETT I. WILLIS
*Counsel for Respondent Mississippi River Corporation*
140 Broadway
New York, N. Y. 10005
(212) DI 4-8000

SULLIVAN & CROMWELL
*Of Counsel*

DAVID W. PECK
*Counsel for Respondents Missouri Pacific Railroad Company, Robert H. Craft and T. C. Davis*
48 Wall Street
New York, N. Y. 10005
(212) 952-8100